

December 17, 2008

Roger W. Hurlbert, President
Sage Information Services
13606 Arnold Drive
P.O.Box 1832
Glen Ellen, CA 95442-1832

**RE: Freedom of Information Act Complaint Against
Sussex County**

Dear Mr. Hurlbert:

On November 18, 2008, the Delaware Department of Justice (“DDOJ”) received your complaint alleging that Sussex County (“the County”) violated the Freedom of Information Act (“FOIA”), 29 *Del. C.* § 10001 *et seq.*, by charging you an unreasonable fee for copying records. On November 19, 2008, we sent your complaint to the County, and we received their response on December 1, 2008. Based on their response, we asked the County for additional information, which was provided on December 12, 2008. This is the DDOJ’s determination pursuant to 29 *Del. C.* § 10005(e) regarding your complaint.

Statement of the Facts

By letter dated August 15, 2008, you requested from Sussex County an electronic media download of current real property assessment data. The County first advised you that they would charge a flat fee of \$12,000 for those records, later reduced to \$3000. According to the County, the information requested is made up of about 4 million separate records.

Relevant Statutes and Regulations

29 *Del. C.* § 10001 states that, “[i]t is vital in a democratic society . . . that citizens have easy access to public records in order that the society remain free and democratic. Towards these ends, and to further the accountability of government to the citizens of this State, this chapter is adopted, and shall be construed.”

29 *Del. C.* § 10003 provides that all public records must be made available to the public upon request for inspection and copying. “Any reasonable expense involved the copying of such records shall be levied as a charge on the citizen requesting such copy.”

29 *Del. C.* § 10003(a). Every public body has the “responsibility . . . to establish rules and regulations regarding . . . fees charged for copying such records.” 29 *Del. C.* § 10003(b).

Paragraph 7a of the County’s Public Records Access Regulations (“Regulations”) provides for a \$0.30 per page charge for copying (with a \$1.00 minimum), while under paragraph 7b, records “not subject to routine photocopying” will be charged at “the actual cost of reproduction.”

Discussion

The County has erroneously equated each record in its files with a page for which a separate copying charge can be made under paragraph 7a of the Regulations. It argues that, at 4 million records requested, the copying charge of \$3000 comes to much less than the per page charge of \$0.30 per record, and is therefore reasonable. However, there are two flaws in this approach. First, a record is not the same as a page, which is commonly understood to refer to a piece of paper. You requested the data in electronic form, not on pages. Therefore, the County has no basis to charge you at the per page rate.

Second, Regulation 7b provides that records “not subject to routine photocopying,” shall be provided at the “actual cost of reproduction.” It is this provision that applies to computer records reproduced in an electronic medium. Moreover, as we have previously determined, electronic data cannot be charged on an arbitrary per record basis that has no relationship to the actual cost of reproduction. *Att’y Gen. Op. 07-IB19* (August 28, 2007), 2007 WL 4732802 (Del. A.G.) (charge of six cents per record for property and tax assessment records). However, because the County has not provided us with proof of the actual cost of reproducing the records you have requested, we are not able to say whether the \$3000 charge is valid.

Conclusion

For the reasons stated herein, it is determined that Sussex County has violated FOIA in assessing an arbitrary per record charge for electronic data. Sussex County is advised to re-evaluate its charges for the requested data under paragraph 7b of its Public Records Access Regulations and promptly re-submit an invoice to you with charges that are not more than the County’s actual costs.

Very truly yours,

Judy Oken Hodas
Deputy Attorney General

APPROVED

Lawrence W. Lewis
State Solicitor

cc:
James D. Griffin, Esquire
Sarah Murray, Opinion Coordinator